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American Postal Workers Union, AFL-CIO (United States Postal Service) and Sylvia R. Williams.
Case 13-CB-17865

November 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On September 9, 2005, Administrative Law Judge C. Richard Miserendino issued the attached decision. The General Counsel filed exceptions and supporting brief. The Respondent filed an answering brief, and the General Counsel filed a response.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. November 30, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Kevin McCormick, Esq., for the General Counsel.

Anton Hajjar, Esq., of Washington, DC, for the Respondent.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Deputy Chief Administrative Law Judge. This case was tried in Chicago, Illinois, on June 16, 2005. The complaint alleges that the American Postal Workers Union (Respondent Union or APWU) violated Section 8(b)(1)(A) of the Act by failing and refusing to pay under a

¹ In affirming the judge's conclusions, we do not rely on his statement that a union owes no duty of fair representation to a deceased employee. Even assuming that the Union here owed such a duty, we find that the General Counsel has not shown that the Union acted arbitrarily; therefore there is no unfair labor practice.

global grievance settlement agreement moneys owed to the estates of 10 former Postal Service employees, all of whom ceased working for the Postal Service prior to the consummation of the settlement agreement and passed away prior to the distribution of settlement moneys.¹

The Respondent's timely answer denied the material allegations of the complaint. All parties have been afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file posthearing briefs.²

On the entire record, including my observation of the demeanor of the witnesses, as well as my credibility determinations based on the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences drawn on the record as a whole, and after considering the briefs filed by the General Counsel and the Respondent Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent Union is a labor organization within the meaning of Section 2(5) of the Act. It admits, and I find, that the Postal Service is subject to the jurisdiction of the National Labor Relations Board pursuant to 39 U.S.C. Section 1209(a).

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

Percy Harrison is a national business agent of the Respondent Union. He is responsible for overseeing the union representation of all APWU craft employees in the States of Illinois and Michigan. Harrison is also the president of the Chicago Bulk Mail Center Area Local (CBMC Local). (Tr. 59, 66.)

On June 23, 1995, CBMC Local Union Steward Joy Berard filed a class action grievance asserting that the Postal Service had violated several provisions of the collective-bargaining agreement by hiring and using casual employees for more than 90-day terms to fill jobs normally performed by career employees. (Tr. 58; Jt. Exh. 2.) No employees were named in the grievance nor did the Union seek compensation based on a lost pay theory.³

The grievance was pursued to step 3 of the grievance procedure. Eventually, the parties engaged in settlement discussions. In early 2004, Harrison and Richard Little, Manager of Labor

¹ At trial, the General Counsel's motion to strike the name, Willie Rhodes, from paragraph VI(a) of the complaint was granted. (Tr. 7-8.)

² The Respondent filed a prehearing brief and a pretrial motion to dismiss the complaint, which was opposed by the General Counsel. The Respondent filed a reply. I reserved ruling on the motion, which is disposed of by this decision. Both parties filed posthearing briefs. The Respondent also filed an opposition to a motion in the General Counsel's posthearing brief seeking reconsideration of an evidentiary ruling I made at trial with respect to rejected GC Exh. 5. Since leave to file the latter was not requested nor granted, I have not read the Respondent's opposition to that motion.

³ The Union's theory was that the unit as a whole was disadvantaged because the continuous use of casuals prevented the hiring of additional full-time and regular part-time employees. There was no evidence or argument that any individual employee lost overtime or otherwise was economically injured because of the Postal Service's conduct.

Relations for Central Illinois District, discussed settling the matter along with another outstanding grievance involving the use of casual employees. (Tr. 32, 34.) Their discussions for the most part focused on the amount of money it would take to resolve the grievances. (Tr. 35, 83–85.) The Postal Service ultimately agreed to pay approximately \$5.5 million directly to employees deemed eligible by the local union presidents to participate in the settlement moneys. There were no restrictions placed on how the local union presidents would determine who was eligible to receive settlement money. (Tr. 37.)

In the course of negotiations, Harrison asked Little what would happen if a settlement check to an employee was returned unclaimed. Little testified that he told Harrison that the Postal Service would keep the money. (Tr. 35, 85.) He explained that it was expensive for the Postal Service to process checks and if a check was mailed and returned unclaimed, the Postal Service would not redistribute the amount of the check to the other employees. (Tr. 36.)⁴ Both Little and Harrison testified that Harrison's question was not raised or discussed in the context of a deceased employee's estate and at no time during negotiations did Harrison tell Little that he wanted to distribute moneys to deceased bargaining unit members. (Tr. 36, 85.)

Harrison discussed Little's comment about the unclaimed checks with another union official and decided it would be prudent to identify those employees who might be difficult to contact. (Tr. 86.) Harrison obtained a list of former CBMC from the Postal Services' personnel department, which showed, among other things, that some of the former employees had passed away several years earlier.

On April 19, 2004, a written settlement agreement was signed in which the parties agreed that the monetary remedy to resolve the grievance would be \$5,600,000 paid in two installments. An initial payment of \$5,500,000 would be divided in following amounts among the following Postal Service facilities: Bloomington P&DF, IL 61701 (\$50,000); Champaign P&DF, IL 61821 (\$500,000); Chicago BMC, Forest Park, IL 60130 (\$4,460,000); Decatur PO, IL 82521 (\$50,000); South Suburban, Bedford Park, IL 60499 (\$140,000); and Franklin Park Repair Center/MTEC (\$300,000). The remaining \$100,000 would be held for at least 3 months after the initial payment to be used to pay any other eligible individuals who were inadvertently "missed" during the first payment. (Jt. Exh. 3, pp. 1 and 3.)

Significantly, the written agreement stated that "[t]he local APWU Presidents from the locals listed in section #1 will identify, determine eligibility, and apportion payment for their respective designated recipients. *A list of those eligible individuals will be completed and submitted to the National Business Agent.* When all designated recipients have been identified, the Business Agent will forward the information to the [Postal Service] Central Illinois District Labor Relations Department for processing." (Jt. Exh. 3, p. 2.) In other words, each local union president had sole discretion to determine who in the

local union would receive a payment, as well as the amount. Also, the Respondent Union did not receive any of the moneys to distribute. Rather, the Postal Service retained the settlement money and distributed it directly to the individuals deemed eligible by the local union presidents. (Tr. 64.)

In addition, the written settlement agreement stated that in connection with the second installment of \$100,000, "any remaining funds will be divided up between the designated recipients from the Chicago BMC as identified by the Business Agent, and will be awarded as a lump sum payment subject to all Federal and State laws and postal regulations." (Jt. Exh. 3, p. 3.) Consistent with Little's remarks about unclaimed moneys, it also stated "that payroll adjustments will not be subject to reapportionment under any circumstances. The Postal Service will not be responsible for any subsequent apportionment or additional payouts, with the exception of Item #3." (Jt. Exh. 3, p. 6.)

As president of the CBMC Area Local, Percy Harrison was responsible for determining who in his local would receive settlement moneys.⁵ (Tr. 67.) Shortly after the agreement was signed, but before a list of recipients was submitted to the Postal Service, Harrison asked Little what would happen to the money, if a check mailed to a deceased employee was returned unclaimed. (Tr. 37.) Little testified that he told Harrison that it would be treated like any other unclaimed check and the money "would go back in the Post Office coffers." (Tr. 37.) Harrison testified that he decided not to include the names of the deceased former employees on a list because he was concerned that if their checks were returned unclaimed the Postal Service would keep the money. Rather than have that happen, he decided to divide the money among current employees and former employees of his local union who were still living. (Tr. 88.)

Decedent, Michael A. Williams, was employed at the CMBC, when he passed away on January 11, 2003. (Tr. 20; Jt. Exh. 1.) In mid-July 2004, his widow, Sylvia Williams learned that the grievance settlement had been paid out. She phoned CMBC Local Union President Harrison asking whether there was a check for her deceased husband. Williams testified that Harrison told her that there was no payment for deceased individuals who were not active on the payroll. (Tr. 22.) He testified that he also told her that the Postal Service would keep any money that was not claimed and therefore he decided not to pay deceased former employees and risk losing some of the settlement money. (Tr. 88.) Williams testified that she pointed out to Harrison that a retired employee, Arthur Young, had been paid, even though he was no longer active on the payroll.⁶ Williams also stated that Harrison told her that he did not want to get into litigation over who was supposed to be paid from a decedent's estate. (Tr. 29–30.)

In November 2004, a dispute arose over whether another group of employees represented by the Respondent Union, the Motor Vehicle Service (MVS) employees, were covered by the

⁴ Little explained that a check might be unclaimed if a person moved without leaving a forwarding address or passed away without identifying next of kin or was in jail and unable to pickup the check. (Tr. 36.)

⁵ The evidence shows that the other local union presidents, e.g., Decatur, Champaign, South Suburban, and Bloomington made decisions affecting individuals in their jurisdictions. (Tr. 67–68.)

⁶ Harrison testified that he paid over 20 retired employees, including Arthur Young, from the settlement moneys. (Tr. 89, 97.)

settlement agreement. A grievance was filed and pursued to arbitration. In December 2004, an arbitrator ruled that the group was included under the terms of the written settlement agreement and should have received settlement moneys. Around the same time, the Postal Service's law department notified Little that the estates/families of 10 deceased former employees were claiming that they should have been included in the settlement. (Tr. 39.)

As a result, on December 30, 2004, Little wrote to Harrison asking him if he wanted to revise his list of "inadvertently missed" recipients for the second wave of payments in light of the arbitrator's decision. In addition, Little pointed out that he had been advised that there were 10 deceased estates/families that were claiming they should have been included in the settlement. Little specifically asked Harrison "[w]as it your intent to exclude these former employees or were they inadvertently missed?" (GC Exh. 3.)

After receiving the letter, Harrison phoned Little asking him why the Postal Service was questioning whether the deceased employees should have received settlement moneys. Harrison testified that he told Little, "I really don't care about them. I said, that has nothing to do with our agreement. Our agreement specifically says that that money was left there for people who we inadvertently missed. I said, I submitted those names to you so long ago and I said, I want you to pay those people." (Tr. 90.)

Harrison followed up the telephone conversation with a letter, dated January 7, 2005, stating, in relevant part:

In regard to the ten deceased estates/families you ask about, I will let the APWU lawyers work out that problem, as my concern is to get those that there are no questions about their status and they should have been paid except for inadvertent error.

Whatever money is left after these people are paid can be left sitting until such time as the other problems have been worked out, inclusive of the "Great B.S." Fletcher gave you on the MVS case.

[GC Exh. 2; Tr. 91.]

B. Analysis and Findings

1. The alleged duty to represent deceased former employees

Section 2(3) of the Act states, in relevant part:

The term "employee" shall include any employee . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor practice or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any . . . individual employed by a supervisor. . . .

Under Section 8(b)(1)(A), a union has a duty to fairly represent all "employees" in the bargaining unit. However, in *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), the Supreme Court held that retired employees are not "employees" within the meaning of the Act, that they are not included in the bargaining unit, and that a union has no duty to represent them in negotiations with the employer or to

take into account their interests in making bona fide economic decisions in favor of employees in the bargaining unit. *Id.* at 180–181. Accord: *Karo v. San Diego Symphony Orchestra Assn.*, 762 F.2d 819 (9th Cir. 1985) (union owed no duty to union member who was not an employee in the bargaining unit); *Cooper v. General Motors Corp.*, 651 F.2d 249 (5th Cir. 1981) (union owes no duty to supervisors who were formerly members of bargaining unit).

If a union owes no duty of fair representation to a retired employee of the bargaining unit, then it reasonably follows that no such duty is owed to a retired employee who is deceased. The undisputed evidence shows that all nine alleged discriminatees had ceased working for the Postal Service and died prior to April 19, 2004, the date the settlement agreement was signed. Specifically, the undisputed evidence shows that they had ceased working for the Postal Service on the following dates:

Jewell Burton	May 28, 2003
Michael A. Williams	January 3, 2003
Benigne B. Earth	January 8, 2001
Dawn Bramwell	November 22, 1999
William Bendemer	September 27, 1999
Robert Janiszewski	May 30, 1998
Clifford Davis	August 11, 1997
Esther Brown	May 11, 1997
Evonne Price	January 24, 1996

[Jt. Exh. 1.]

In addition, Harrison's un rebutted testimony shows that all of these former employees passed away prior to April 19, 2004. (Tr. 68–72.) The General Counsel has not submitted any authority (Board or judicial) showing that a union's duty of representation extends to deceased former employees. Accordingly, I find that the Respondent Union owed no duty of representation to the deceased former employees or their estates.

2. Harrison's reasonable and practical determination

In addition, and under analogous circumstances, the Board held in *Steelworkers Local Union No. 2869 (Kaiser Steel Co.)*, 239 NLRB 982 (1978), that a union lawfully limited the distribution of moneys received in a settlement of a class action grievance to employees, who remained employed in the bargaining unit at the time the grievances were settled. Employees who had retired, accepted supervisory positions, quit, been transferred out of the unit, or had been discharged did not receive any settlement moneys. The Board stated that the union's decision "simply constituted one of a series of reasonable, practical administrative determinations regarding those employees entitled to share in the settlement proceeds," in circumstances where it was difficult to precisely determine individual losses in pay. 239 NLRB at 983.

In the present case, the undisputed evidence viewed as a whole shows that Harrison made a reasonable, practical administrative decision to pay only current and former employees who were living at the time of the payout. The evidence shows that Harrison checked and double-checked with Little to make sure that any moneys unclaimed would be kept by the Postal Service, rather than be redistributed among the remainder of the

employees. After determining that a number of former employees were no longer living, he reasoned that any one or more of their checks might go unclaimed and on that basis made the decision not to pay them because he did not want to risk losing money to the Postal Service. The undisputed evidence shows that having made that decision Harrison paid current and retired employees, who were living.

In addition, the evidence shows that Harrison's determination not to include the former deceased employees in the pool of "overlooked" employees to be paid out of the \$100,000 was also reasonable and practical. The settlement agreement specifically states that "any remaining funds from the \$100,000 will be divided up between the designated recipients from the Chicago BMC as identified by the Business Agent" of which Harrison was the local president. Thus, by not paying the deceased former employees he maximized the potential payout for the current and retired CBMC local employees, who were living, rather than risk losing some of the money if it went unclaimed.

At trial, the General Counsel introduced the Respondent Union's pretrial statement purportedly to show that Harrison's decision to exclude deceased members from participating in the settlement was arbitrary. (Tr. 74; GC Exh. 6.) If anything, however, the document on its face corroborates Harrison's testimony that the local union presidents had the sole authority to decide who received settlement moneys and that if a check was unclaimed, the Postal Service would not reissue the check. Moreover, it shows that Harrison consistently took the position that as the president of the CBMC local, he decided not to pay the former employees who died prior to April 19, 2004, because he was concerned that the Postal Service would keep any unclaimed checks.

It is settled law that a union may balance the rights of individual employees against the collective good, or it may subordinate the interests of one group of employees to those of another group, if its conduct is based upon permissible considerations. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). If a union resolves conflicts between employees or groups of employees in a rational, honest, and nonarbitrary manner, its conduct may be lawful under Section 8(b)(1)(A), even if some employees are adversely affected by its decision. See also, *Humphrey v. Moore*, 375 U.S. 335, 348-349 (1964).

The General Counsel argues in its posthearing brief that Harrison's determination was arbitrary because a deceased retiree from another local union, Linda Triimar, was paid settlement moneys. (Tr. 46, 48, 60.) That argument fails for several reasons. First, it ignores the fact that the settlement agreement specifically states that each local president has the sole authority to pay or not to pay. Second, it ignores the undisputed evidence that Linda Triimar was a member of the Decatur, Illinois local, whose president, Charles Read, for reasons unstated in

the record decided to pay her.⁷ (Tr. 63.) She may have been paid because she was living on the date the settlement agreement was signed, but died subsequently.⁸ She may have lived next door to her local union president and was paid because he knew or was able to identify the conservator of her estate to ensure that her check was claimed and cashed. She may have been paid because her local union president was unaware that any unclaimed check would inure to the Postal Service and therefore that factor did not enter into the decision to pay her. She may have been paid for any of the above reasons or for none of them. The fact that the Decatur local president paid one deceased person does not support an inference that Harrison's determination not to pay the deceased employees from his local union was arbitrary absent any showing by the General Counsel of the circumstances surrounding the payment.⁹

Accordingly, I find based on the evidence viewed as a whole that the determination to exclude the deceased former employees from participating in the settlement was not arbitrary. Rather it was a reasonable and practical determination that was made in order to alleviate the risk of losing settlement moneys that might have gone unclaimed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The complaint is dismissed.

⁷ Harrison credibly testified that he did not know anything about the individuals included on the list submitted by the Decatur local. (Tr. 94.)

⁸ There is no evidence showing when she died. (Tr. 94-95.)

⁹ At trial, the General Counsel sought to introduce into evidence a November 30, 2004 letter and attachment responsive to a Board agent's document investigatory request. Counsel for the General Counsel asserted that he wanted to introduce the document to show that Triimar had been paid. (Tr. 46-55; GC Exh. 5.) When it was pointed out to him that he already had introduced evidence showing the same, he conceded that it was also being introduced to show that Harrison received a higher payment than anyone else and opined that this fact showed the arbitrary nature of Harrison's determination to exclude the deceased former employees. (Tr. 53-55.) Agreeing with the Respondent Union's counsel, I excluded the document because it is cumulative on the issue of Triimar being paid, and because I considered it a backdoor attempt to expand the scope of the complaint to allege that the calculation of the settlement amounts were unfair, arbitrary, or discriminatory. In his posthearing brief, counsel for the General Counsel moved for reconsideration. I deny that motion for the same reasons given at trial.

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.